Carlsen Porsche Audi, Inc. *and* **International Association of Machinists and Aerospace Workers, AFL-CIO, Local Lodge No. 1414**

Carl R. Carlsen, Inc. *and* **International Association of Machinists and Aerospace Workers, AFL-CIO, Local Lodge No. 1414.** Cases 32-CA-3229, 32-CA-3471, 32-CA-3241, and 32-CA-3421

February 11, 1983

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS JENKINS AND HUNTER

On July 6, 1982, Administrative Law Judge Clifford H. Anderson issued the attached Decision in this proceeding. Thereafter, the Charging Party filed exceptions and a supporting brief, and Respondents filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety, and that the settlement agreements in Cases 32-CA-3229 and 32-CA-3241 be, and they hereby are, reinstated.

[1] The Charging Party has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In adopting the Administrative Law Judge's recommended Order, Member Jenkins places no reliance on *Hollywood Roosevelt Hotel Co.*, 235 NLRB 1397 (1978), wherein he dissented.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge: This matter was heard before me on February 8-12, 23, 24, and March 1 and 2, 1982, in Oakland, California. The case arose as follows: On November 26, 1980, International Association of Machinists and Aerospace Workers, AFL-CIO, Local Lodge No. 1414 (the Charging Party or the Union) filed a charge in Case 32-CA-3229 against Carlsen Porsche Audi, Inc. (Porsche Audi). On December 4, 1980, the Union filed a charge in Case 32-CA-3241 against Carl R. Carlsen, Inc. (Volkswagen and collectively with Porsche Audi, Respondents). The Union and Respondents entered into separate settlement agreements concerning these cases, which settlements were approved by the Regional Director for Region 32 of the National Labor Relations Board (Regional Director and the Board, respectively) on January 12, 1981. On February 18, 1981, the Union filed a charge in Case 32-CA-3421 against Volkswagen, which charge was amended on April 17 and on May 14, 1981. On March 12, 1981, the Union filed a charge in Case 32-CA-3471 against Porsche Audi, which charge was amended on May 14, 1981. On April 24, 1981, the Regional Director issued an order withdrawing approval of and setting aside settlement agreements, order consolidating cases, and consolidated complaint and notice of hearing in the above cases. The Regional Director issued an amendment of his order on July 1, 1981, and an amended order on January 1, 1982. Respondents filed appropriate answers to the complaints. In response to various motions and oppositions filed by the parties, the Regional Director issued orders rescheduling the hearing on November 2, 1981, and January 11 and 21, 1982. On January 19, 1982, Respondents filed a motion to sever cases, which motion I denied by order dated January 29, 1982. Respondents on February 4, 1982, sought permission by the Board to appeal my order denying severance, which motion was denied by the Board on February 10, 1982.

The amended consolidated complaint, as further amended at the hearing, alleges a wide variety of conduct by Respondents which occurred in the context of collective-bargaining negotiations and a labor dispute with the Charging Party. This conduct is alleged to violate Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended (the Act). Respondents deny that they had violated the Act and further allege that the settlement agreements were improperly set aside by the Regional Director and should be reinstated.

All parties were given full opportunity to participate at the hearing, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file post-hearing briefs. Upon the entire record herein,[1] including my observation of the witnesses and their demeanor and the briefs of all parties, I make the following:

FINDINGS OF FACT

I. JURISDICTION

At all times material herein, Respondents, and each of them, have been California state corporations, engaged in the retail sale and servicing of automobiles at Palo Alto, California. Each Respondent in the course of its business operations annually enjoys gross revenues in excess of $500,000 and annually purchases and receives goods and

[1] Certain errors in the transcript are hereby noted and corrected.

services from outside the State of California of a value exceeding $5,000

II. LABOR ORGANIZATION

The Union is, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *Issues*

These cases present a variety of legal and factual issues concerning the events and circumstances arising in the context of collective bargaining and a strike. The General Counsel has alleged a variety of improper actions by Respondents' alleged agents as violative of Section 8(a)(1) of the Act, which are also offered as evidence of an illegal course of conduct by Respondent designed to avoid reaching agreement with and to undermine the Union as the employees' representative. The General Counsel also alleges that Respondents engaged in bad-faith bargaining with the Union in violation of Section 8(a)(5) of the Act. Volkswagen is alleged to have terminated employee Mark Thompson because of his activities on behalf of the Union in violation of Section 8(a)(3) of the Act. The General Counsel further alleges that certain employees engaged in an unfair labor practice strike against Respondents and that, by failing and refusing to make valid reinstatement offers to these employees in a variety of circumstances, each Respondent has violated Section 8(a)(3) of the Act.

Each Respondent denies the commission of any unfair labor practice. Respondents further deny generally the misconduct attributed to them. They claim their bargaining was hard but fair and that the strike was an economic strike. They argue that their treatment of strikers was consistent with the Act and not illegal. Volkswagen argues that Thompson was properly discharged. Collaterally, Respondents deny that they committed sufficient unfair labor practices following the Regional Director's approval of the settlement agreements on January 12, 1981, to justify setting them aside. Respondents move that the settlement agreements be reinstated and that all conduct occurring before they were approved be held to be subsumed in them and hence barred from consideration as unfair labor practices.

B. *Background*

1. Agency

Volkswagen and Porsche Audi are new- and used-car dealerships with associated maintenance and repair facilities. These corporate entities were previously owned by Carl R. Carlsen. Volkswagen is now controlled by Gary W. Wheeler, its president, general manager, and co-owner. Charles A. Burton is Volkswagen's other owner and is also a corporate officer. Marchelle Duncan is Volkswagen's parts manager and has been its service manager since January 1981. Kenneth Curzon was Volkswagen's service manager until January 1981. Porsche Audi is now controlled by Charles A. Burton, its president, general manager, and co-owner. Wheeler is Porsche Audi's other owner and is also a corporate officer. Uwe Dietz was Porsche Audi's service manager from September 1979 to April 1981, and Richard Pasqualli is its parts manager. As set forth in greater detail, *infra*, Respondents joined Redwood Employers Association (Redwood), a firm providing labor relations consultation and representation services, and retained the services of David Comb, its executive director, during collective bargaining with the Union. There is no real dispute and I find that the above individuals were at relevant times agents of the indicated Respondent.

2. Bargaining history

Respondents for several years were part of a multiemployer bargaining unit represented by the Peninsula Automobile Dealers Association (the Association). The Association on behalf of Respondents and others had entered into a series of collective-bargaining agreements with the Union covering separate units of automobile dealership service advisors and mechanics. The last such agreements which applied to Respondents' employees expired in July 1980 (the Association agreements).

The Union and the Association prepared to enter into negotiations for new contracts in early 1980. In April, Comb timely informed the Association that Volkswagen and Porsche Audi were withdrawing from the Association and that they would no longer be part of the multiemployer units or represented by the Association. On April 23, 1980, by separate letter for each of the four bargaining units[2] of Respondents' employees, Comb informed the Union that Respondents had withdrawn from the Association and that he would serve as each Respondent's representative in bargaining. The letters further stated that Respondents did not wish the existing multiemployer contracts to renew automatically and that they wished to bargain as individual employees over terms of new agreements. The Union by letter dated May 15, 1980, told Respondents it too wished the current contract to terminate and that new contracts be negotiated. By July, the Union and Comb confirmed arrangements to commence bargaining in August.[3]

The Association and the Union entered into bargaining without the participation of Respondents. The Union struck the various employer-members of the Association on August 18, 1980.

C. *Events Before the Settlement Agreements Were Approved*

The complexity and variety of the contentions litigated render a strictly chronological presentation of events less useful in developing the issues to be resolved. Accordingly, I have grouped the events into categories roughly

[2] Subsequent bargaining between Volkswagen and the Union resulted in an agreement to consolidate the two groups of Volkswagen's employees into a single unit. Porsche Audi and the Union preserved the separate units utilized in the multiemployer bargaining. There was no dispute that each of the various units was appropriate for bargaining within the meaning of Sec. 9 of the Act or that the Union represented employees therein and I so find.

[3] The primary events relevant herein occurred from July 1980 to June 1981. Unless otherwise specified, all dates refer to that period.

correspondent with the major elements of the complaint and have separated pre- and post-settlement agreement events.

1. Allegations of violative statements

a. *Against Porsche Audi*

(1) Paragraph 15(a) of the complaint—Uwe Dietz solicited employees to circulate a decertification petition

Employee Peter Potman testified that he overheard Dietz talking to employee Jack Shirley near the parts counter within hearing distance of employee Joe Maranello in the first 2 weeks of August 1980. Potman recalled that Dietz approached Shirley and said that, since Shirley had given notice and was leaving,[4] he had nothing to lose. Dietz asked Shirley: "Why don't you circulate a petition to get out of the Union?" Potman recalled that Shirley laughed and said he would not do so. Maranello testified that he was at the parts counter when he overheard a conversation between Dietz and Shirley. He recalled that Dietz, who was holding a piece of paper, told Shirley that the Union was not needed and that he wished Shirley would pass around a petition to the rest of the mechanics. Shirley smiled and told Dietz, in Maranello's memory, "you must be crazy if you think I am going to pass this around." Dietz categorically denied either discussing a petition with Shirley or asking Shirley to circulate a petition. Shirley did not testify.

Maranello also testified that within the same general period he overheard a conversation between Dietz and mechanic George Barrena. Dietz told Barrena, in Maranello's recollection, "to sign the petition and something to the effect that the union wasn't needed and he would be better off if he signed this petition." Barrena declined to sign. Potman testified that he and Maranello overheard Barrena ask Dietz if he was to get a raise. Dietz answered he would get his raise as soon as "we got rid of the union and signed the contract." Barrena responded that conditions would improve for a time but that he was uncertain about later events and his job security. Dietz denied asking Barrena to circulate any type of document, but recalled a conversation with Barrena after the August mechanics meeting in which Barrena inquired about raises. Dietz remembered telling Barrena that he could not get a raise because there was no contract. Barrena did not testify.

(2) Paragraphs 15(b) and (i) of the complaint—Richard Pasqualli threatened an employee with termination and/or loss of benefits unless he abandoned the Union

Potman testified that immediately before the strike he asked Pasqualli "what was going to happen" and that Pasqualli told him that, if he joined the Union in a strike, Porsche Audi had people ready to replace him. Potman recalled repeating this question to Pasqualli about a week later. Pasqualli told him that if he joined the strike he would be out of a job and have difficulties supporting his wife and meeting his bills. Pasqualli testified that he recalled Potman asking the question on only one occasion and that he told Potman that the dealership would continue operations irrespective of any strike. Pasqualli denied that he ever would have made the other statements attributed to him by Potman.

Harold Sinzig testified that just before the strike he had a conversation with Pasqualli in which Pasqualli expressed pleasure with Sinzig's performance and told him that he hoped Porsche Audi would not lose him when employees went out on strike. Sinzig replied that he might have to join the strike because he was a union member. Sinzig testified that Pasqualli responded that there "might not be a Union." Pasqualli recalled neither the conversation described by Sinzig nor the remarks Sinzig attributed to him.

(3) Paragraphs 15(c), (d), and (f) of the complaint—Dietz solicited employees to enter into individual employment contracts and informed employees they would not receive wage increases unless they entered into individual employment contracts with Porsche Audi

Dietz held a regular monthly shop meeting in the third week of August 1980. At that meeting he distributed to employees a summary of the negotiations, discussed its contents, and fielded questions. Dietz testified that mechanics aaked him if raises could be given. He answered that raises could not be given and added: "We don't have a contract. Unless a contract is signed with anybody, we can't have any pay increases." Dietz testified that his use of the word "contract" was a reference to an agreement with the Union. Dietz thought he might have also said that if everyone signs the contract there will be no problem. He also testified that he believed he made this statement to Sinzig.

Porsche Audi prepared a two-page document entitled "Automotive Technician—Journeyman Mechanic Agreement Summary" which summarized terms and conditions of employment. It provided for the signatures of the employee and a Porsche Audi agent. One such agreement was signed by employee Rudi Angermund and by Dietz on September 17. Dietz testified that the document was prepared after the strike started so that strike replacement employee applicants would have something in writing setting forth the terms of employment offered them. He further testified that employees who accepted employment were not required to sign the form. He admitted however that he asked Angermund to sign and that after he did so Dietz also signed. Angermund did not testify. Burton testified that the signature lines were added to the document so that each prospective employee would have the assurance of a signed commitment from Porsche Audi concerning promised benefits. Burton testified that to his knowledge only a single employee signed the document.

[4] It is undisputed that Shirley left Porsche Audi's employ on July 31.

(4) Paragraph 15(e) of the complaint—Dietz told an employee that the strike was part of a Porsche Audi plan to remove the Union and hire antiunion replacement

August Sinzig[5] testified that about 1 week into the strike he went into the service advisor's office to pick up his belongings and there met Dietz. Dietz asked how things were going. August Sinzig answered: "Fine so far." Then Dietz said, in Sinzig's recollection: "It is just the strategy. You guys are out there. They probably will hire new people, and then come the vote and you are out." Dietz recalled Sinzig's return to the facility and a brief conversation with him. He testified that the conversation involved only a friendly exchange. He specifically denied making any statements about a "strategy" or related statements.

(5) Paragraph 15(g) of the complaint—Pasqualli told an employee he had been replaced and could not return to work

Peter Potman testified that he had been on holiday at the time of the strike's commencement and telephoned the Porsche Audi facility on September 14, 1980. He reached Pasqualli. Potman testified he asked Pasqualli what was going on and whether he should come into work the following day. Potman testified that Pasqualli told him that he did not ever have to come back to work and that he had been replaced. Pasqualli testified that he had only a vague recollection of the telephone conversation. He said that he did not recall telling Potman he had been replaced and that he would not have made that statement because it was not true.

(6) Paragraphs 15(h) and 16(g) of the complaint—Wheeler threatened an employee with sale of the dealership before he would allow union-represented employees to return to work

Following a mass picketing of the facilities, placed variously in October or November 1980, Wheeler drove through the picket line to enter the facility. Potman who was picketing at the time recalled that Wheeler rolled down the window of his automobile and shouted that the picketers had "no class" and that while he had been willing to talk to strikers up to that time he would no longer do so. Maranello testified that Harold Sinzig asked Wheeler in the same conversation when striking employees would be going back to work and that Wheeler replied "something to the effect that he'd sell the business before he let any of us go back to work." Harold Sinzig recalled that Wheeler told him, Maranello, and Potman that he "would rather sell the place than have us come back as a Union shop" and that Wheeler then "just walked off." Wheeler recalled driving up and speaking to employees consistent with Potman's testimony. He specifically denied, however, making any statement about selling the facility in that conversation or in any other.

[5] The parties were at issue regarding the supervisory status of August Sinzig.

b. *Against Volkswagen*

(1) Paragraph 16(a) of the complaint—Curzon and Wheeler offer an employee off-contract work

Employee Mark Thompson testified that shortly after his hire in March 1980 he was asked to perform predelivery inspection and preparation of new automobiles on an after-hours, piece-rate basis and that he did so in May, June, July, and August 1980. Wheeler testified that Volkswagen had regularly engaged employees in such work for years even though it was admittedly inconsistent with the then-applicable Association contract. Employee Levon Mosley testified that this practice had been well known to the union shop steward.

(2) Paragraphs 16(b)–16(e) of the complaint—Curzon's statements to employees

Harold Sinzig testified to a variety of prestrike statements by his supervisor, Curzon. Sinzig testified that Curzon approached a group of employees one morning just before the Association contract expired and asked: (1) if employees were golng to strike; (2) if there had been strike votes; and (3) if the employees knew what was going to happen when the contract expired. The employees expressed ignorance. Curzon then said the employees should seek a representative other than the Union—that employees should get outside advice on what to do because if they went out on strike they would never be working there again.

Employee Del Bello testified to a conversation with Curzon late in August. Curzon came to him and asked if Del Bello had told employee Peachey to join the Union. Del Bello said he had not. A discussion ensued. Curzon finally said he believed Del Bello and told him to keep the conversation quiet. Curzon continued saying that sometimes people who say they are against the Union are hired and then change their mind. Curzon did not testify.

(3) Paragraph 16(f) of the complaint—Wheeler threatened employees by telling them that if they struck they would not be reemployed

Harold Sinzig testified that 3 to 4 weeks before the strike commenced he was called into the office and there spoke to Wheeler and Curzon. Sinzig recalled that Wheeler said that he was afraid that if employees went on strike he would not be able to let them back in and that they would lose their jobs Wheeler did not specifically address this conversation. Curzon did not testify.

2. Bargaining

a. *Background and comment on credibility*

Wheeler and Burton each determined to bargain as a single employer and each obtained the services of Comb who was to represent each in concurrent negotiations with the Union. Comb, after consulting with Wheeler and Burton regarding their desires and preferences, prepared contract proposals for each Respondent, which were essentially *de novo* contracts rather than variants to or modifications of the expiring Association contract.

Representing the Union throughout the negotiations were business representatives Leland Stafford and Calvin King.[6]

My findings regarding bargaining sessions both before and after the settlement agreement are based on the testimony of Burton, Wheeler, Comb, and Stafford. No other testimony was offered. Burton and Wheeler did not testify at length concerning the specifics of each session and neither was experienced in the jargon of labor relations. I have relied on their testimony only collaterally. Stafford and Comb are professionals who are intimately familiar with the process of bargaining and who were actively involved in the formulation of proposals and expression of positions at each bargaining session. Their testimony forms the primary basis for the findings herein.

Neither Comb nor Stafford recalled the entire series of sessions or the specifics of each with total clarity or consistency. Yet, each had a clear memory, refreshed by notes and contract proposal drafts, of the bulk of each session. I do not regard the inconsistencies in the testimony of either Comb or Stafford to be evidence of a design to mislead, but rather took them to be honest mistakes or the result of confusion during lengthy testimony regarding bargaining details. Where Comb and Stafford differ on events, I have generally credited the witness who testified to a specific statement over the witness who denied the statement was made. This is so because in the lengthy negotiations honest witnesses are far more likely to have failed to hear or to have forgotten a specific statement made at a particular session rather than to have a false memory of it having been made. I regard each individual as an honest witness. Specific resolutions have also turned on the probabilities derived from the context of each disputed fact and, in some cases, on significant variations in the demeanor of the witnesses during their testimony regarding certain disputed matters.

b. *Initial meeting—August 5, 1980*

Stafford and King met with Burton and Comb on August 5, 1980—Wheeler being out of the State. The meeting was brief with little discussion beyond an exchange of proposals and occasional expressions of disapproval by each side regarding the other side's proposals. Comb's proposal was in effect a series of clauses constituting an entire contract essentially independent of the now expired Association contract. The Union's proposals constituted minor modifications to the Association contract and were identical to the Union's initial proposals in the Association negotiations then underway. Following this exchange, the parties agreed to meet again on August 18, 1980, at which time Wheeler would be available.

[6] The negotiations initially included Teamsters representatives who represented separate units of Respondents' employees. The issues discussed regarding the Teamsters units are unrelated to the instant case. No representative from the Teamsters testified. I will omit further reference to those discussions or the presence or absence of those representatives.

c. *The August 18, 1980, meeting*

King, Stafford, Comb, Burton, and Wheeler met on August 18, 1980. Comb submitted Volkswagen's proposals. He pointed out that Volkswagen had accepted the Union's proposal to combine the service writer and mechanics units. The Volkswagen proposals were in relevant portions substantially identical to the Porsche Audi's August 5 proposals. Comb also submitted minor modifications to Porsche Audi's August 5 proposals.[7] A topic-by-topic discussion of Respondents' proposals ensued.

King[8] suggested that Respondents' open shop proposal was unacceptable and would "never happen." Comb[9] asserted Respondents "desired" such a clause. King also protested Respondents' management-rights clause asserting that under it the Union lost all rights to protest unilateral changes by each Respondent and that the subcontracting proposal language gave management total control over subletting work. Comb again indicated Respondents wished the language they proposed. King complained of the hours worked requirement in the vacation language of Respondents' proposal arguing that there had not been such a requirement in the previous contract. The clause required an employee to have worked 1,600 hours to qualify for an annual vacation. Comb took the position that the language was Respondents' proposal at least for the present.

King argued against Respondents' proposed picket line language, noting that it changed the language of the previous contract and eliminated protection for employees who chose to honor picket lines as sympathy strikers. Comb answered again that Respondents would like the language they had proposed. King also argued that Respondents' seniority language provided for loss of an employee's seniority after an unexcused absence of 48 hours and restricted the grievability of seniority issues. He also challenged Respondents' proposal language as allowing the employers to employ "irregular part-time and seasonal" employees. Comb defended these propositions by suggesting they would reduce employee-missed work and give management "necessary flexibility."

King challenged the proposed flat rate pay, which changed the previously provided hourly wages, as against union interests. Comb replied that the proposal would enhance employer control of work. The Union challenged the pension and health and welfare proposals of Comb, preferring the coverage previously provided[10] or an independent automotive industry plan. Comb indicated their proposal had the advantage of providing uniform health and welfare coverage among all Respond-

[7] There were numerous and significant differences between Comb's proposed contract and the Union's proposal. The differences included, *inter alia*, the following: union security, management rights, subcontracting, guaranteed worktime, vacations, seniority, union access, tool insurance, picket line language, pension, health and welfare, grievance and arbitration, form of remuneration, and contract duration.

[8] Stafford spoke little during the initial negotiations, apparently as a result of a short-term loss of voice.

[9] Comb was the primary speaker for each Respondent throughout the negotiations.

[10] The Association contract had provided coverage under automotive industry plans. Respondents' proposals were for private plans.

ents' employees and that the type of pension plan proposed by Respondents was "better" than the previous plan. Other items of disagreement, including the union access language, were discussed between the parties with the Union generally expressing disapproval of Respondents' proposals and advocating a return to the language in the previous contract.

Following these discussions Comb made various modifications in Respondents' proposals, including improved workweek guarantees for each Respondent. Vacation entitlements were modified, the 48-hour loss of seniority provision was deleted. Tool insurance coverage for employees was increased, the flat rate pay system was made voluntary, and employer monthly contributions to its proposed pension plan were increased. No agreements were reached on any specific proposal, nor did the Union modify its own proposals which were discussed only the form of union opposition to the tendered language of Respondents' proposals. The meeting ended with an agreement to meet again in August.

d. *The August 28, 1980, meeting*

The four met again on August 28, 1980. The meeting began with King recapitulating the differences in the positions of the parties. Comb asked if the Union remained firm as to its previous position. King said yes. King asked Comb for Respondents' position and Comb said that there might be movement on certain proposals. With respect to union security, Comb indicated that "at least at that stage" Respondent had no desire to modify their proposal. King and Stafford reasserted their adamant opposition to an open shop and suggested that were they to agree to such language they would lose their jobs. King and Comb discussed at length the subcontracting clause and their differences regarding the consequences and implications of Respondents' proposal. Comb indicated some flexibility in accepting other language so long as management retained the right to subcontract work which had been traditionally contracted out.

Comb removed the 1,600-hour requirement in his vacation proposal substituting a 2-percent formula. He improved the tool insurance proposals which were then slightly different with respect to each Respondent. Comb also said Respondents would, with limitations, accept the Union's proposed automotive industry independent health and welfare plan. The proposed pension plan was discussed and compared to the previous pension plan which was still advocated by the Union. Comb gave the Union certain explanatory material on the plan. The parties did not agree on the pension issue nor on the remaining major items in dispute. As to these issues the negotiators agreed that their positions were clearly opposed. The meeting ended with an agreement to meet again on September 12.

e. *Intervening events and the aborted September 12, 1980, meeting*

On the evening of August 28, 1980, the Union held a membership meeting at which Respondents' most recent proposals were rejected and a strike authorized. Employees struck each Respondent on September 8. Comb and Stafford spoke by telephone that day or the next. It was agreed that the September 12 meeting would not be held and that the parties had reached "impasse." Comb told Stafford that Respondents would try to put their last offer into effect. Respondents thereafter implemented their last offer with certain variations discussed, *infra*. Employees were covered by Respondents' existing health and welfare plans which heretofore applied only to nonorganized employees. No pension coverage was implemented until December 1981.

f. *The October 23 meeting and other events*

A "meeting" was held on October 23 with Respondents and the Union remaining in separate rooms and a Federal Mediation and Conciliation agent acting as intermediary. The process was unsuccessful—no change of positions occurred. No further negotiations were requested or held before the settlement agreements were approved on January 12, 1981. The strike continued unabated.

In October and early November 1980, Respondents filed RM petitions covering the units involved herein. The Regional Director issued a Decision and Direction of Election with respect to each unit on November 25, 1980. The parties negotiated settlement agreements resolving Cases 32-CA-3229 and 32-CA-3471, which were approved by the Regional Director on January 12, 1981. The RM petitions were also withdrawn with the Regional Director's approval and the elections canceled.

D. *Events After the Settlement Agreements Were Approved*

1. Bargaining

a. *The January 28, 1981, meeting*

Following approval of the settlement agreements, the Union sought a resumption of negotiations. The parties met on January 28 in split sessions. The morning session dealing with Porsche Audi was attended by Wheeler and Comb for Volkswagen and Stafford, King, and Joseph Colton, union counsel, for the Union.[11] The same parties attended the afternoon session, save Burton attended for Porsche Audi, and Wheeler for Volkswagen. Colton did not attend this second session.

During bargaining in the morning King and Comb reviewed the areas of disagreement between the parties generally and then went over Respondents' specific proposals noting agreement or the lack of it. Stafford asked Comb if Respondents were still "wedded" to an open shop. Stafford added that "if the open shop clause were removed from the table, that we could negotiate a contract and possibly agree on most of the other provisions, that we could get a contract." Respondents' position on open shop was unmodified. Previous discussions and disagreements regarding the subcontracting clause were reviewed. Stafford or King asked Colton if he would prepare new contract language which might be acceptable to both sides. This procedure was agreed to. Similar new

[11] Colton did not testify.

language was to be drafted by Colton with respect to the management rights and grievance disagreements. The Union asked for specifics from Comb regarding Respondents' proposed pension program. Comb indicated that several carriers were under consideration by Respondents but that he would obtain the information requested and provide it at the next meeting.

The substance of the afternoon session was similar to that of the morning. The parties adopted the proposal modifications of the morning with Comb proposing additional minor changes unique to Porsche Audi which were generally agreeable to the Union. The basic differences and disagreements remaining between the Union and Respondents concerned issues wherein each Respondent held the same position. The meeting ended with Comb indicating that he would obtain the requested pension plan details and the Union would formulate new language on the specified areas of disagreement.

b. *The February 25, 1981, meeting*

The parties met again on February 25. The Union earlier sent a telegram to Comb dated February 11, 1981, protesting the delay in arranging a meeting. The bargaining again took place in two sessions with King and Stafford representing the Union and Comb joining with Wheeler at the afternoon session and with Burton at the morning session. In the Porsche Audi session, the Union submitted new proposed language for grievance-arbitration, management-rights, and subcontracting clauses. Substantial agreement was reached on grievance- arbitration language, some reduction of disagreement was obtained concerning management rights, and no agreement was obtained with respect to subcontracting. Comb supplied the Union a description of its proposed pension plan. The Union offered to accept the pension plan if Porsche Audi would drop its demand for an open shop and added that if this was done a contract could be reached. This was not acceptable to Porsche Audi.

The second session began with Comb stating that the agreements reached in the morning would also apply to Volkswagen. Additional discussion and questioning occurred regarding the effect and means of transferring employees from the previous pension plan to a new and different plan and the liabilities and consequences of such a change. The same offer was made by the Union regarding acceptance of other disputed proposals in exchange for union security. The offer was not accepted by Volkswagen. The meetings concluded with an agreement to meet again.

c. *The March 20, 1981, meeting*

The same individuals met on a split session basis on March 20, 1981, with the Porsche Audi session occurring in the morning, the Volkswagen session in the afternoon. In the morning session the parties initially exchanged information relevant to Respondents' pension proposal and discussed the recent unfair labor practice charge that the Union had filed. Stafford then said that if Porsche Audi would agree to a union-security clause the "other matters would not really be issues, that they were certainly resolvable." The discussion continued. Comb perceived an allusion to some possible compromise being possible in the union-security clause. Comb and Burton caucused separately. The parties reconvened and Comb announced that Porsche Audi was willing to compromise by accepting a modified union-security clause[12] and the Union's pension proposal if the other matters still in dispute were resolved.

King said that he could not see a difference between Comb's new proposal and a straight open shop clause. Stafford said the Union would not tolerate union members and nonunion employees working together. The Union did not explicitly reject the proposal. The parties discussed the possibility of settling related matters if a contract could be reached. Comb suggested that, if a contract could be reached, all sides should withdraw all pending litigation. The Union's unfair labor practices and internal union discipline charges were mentioned in this context. Stafford indicated that he had no control over internal union discipline charges then pending against certain of Respondents' nonstriking employees. Comb disputed this. Stafford indicated he would check on the matters raised in the meeting, including the modified union-security proposal, and would get back to Comb in a week. The session ended.

The afternoon session commenced with Comb generally asserting that what had been offered by Porsche Audi earlier that day would also apply to Volkswagen. Stafford asked about the return to work of striking employees after an agreement was reached and Comb responded that Respondents would return employees to work "as promptly as possible." Stafford said again he would get back to Comb in a week on Respondents' proposals and the meeting ended. No further meetings were suggested.

d. *Further communications*

Comb and Stafford talked by telephone in early May. Stafford told Comb that Respondents' modified union-security clause was not acceptable to the Union. Subsequently Comb contacted other union officials and repeated Respondents' offers without receiving acceptance. In July and August the parties exchanged correspondence recapitulating their views of the differences outstanding between them. Comb spoke by telephone in September 1981 to Stafford and King offering to accept "all the Union goodies" in exchange for union acceptance of Respondents' union-security proposal. The parties could not reach agreement. In February 1982, Comb, on behalf of Volkswagen, offered a "standard" union-security clause in exchange for union acceptance of Respondents' various proposals including its pension and health and welfare proposals. That offer was not accepted by the Union. No further bargaining meetings had occurred or been requested as of the conclusion of the hearing.

[12] The modified union-security clause described by Comb would allow employees currently employed a period of perhaps 30 days to determine if they wished to join the Union. Thereafter all current employees who elected to join the Union and all new employees would be subject to a normal union-security obligation. Thus, the employees who began work during the strike had an option to avoid compulsory union membership. Others would not.

2. Volkswagen's discharge of employee Mark Thompson

Employee Mark Thompson participated in the strike Volkswagen and picketed in support thereof. On February 20, 1981, the strike was in progress. Thompson was on strike and appeared at the picket line that day. Employee Daniel Madrano did not join the strike and was working that day. In midafternoon, Madrano had taken a customer's car on a test drive and was returning to the facility. He testified that, while en route to Volkswagen in the customer vehicle, a car coming from the opposite direction suddenly pulled into his lane and stopped broadside in front of him. The maneuver caused Madrano to swerve to avoid a collision. The other car then attempted to back into him as he passed it on the left. Madrano identified the driver as Thompson and the car as Thompson's. Thompson testified to an unrelated minor incident with Madrano as occurring on or about that day but denied being in any way involved in the incident described by Madrano.

Madrano returned to the facility and reported the incident including his identification of Thompson to Marchelle Duncan, the service department manager. The events were thereafter reported to Wheeler. A police report was filed and Volkswagen's counsel was contacted. With the agreement of counsel, Volkswagen terminated Thompson without discussing the events with him. Thompson's March 2, 1981, termination letter from Volkswagen gave as the reason for the termination:

> Our research indicates that on [February 20, 1981] you deliberately attempted to physically assault one of our employees. Further, your total disregard for vehicles intrusted to our care cannot be tolerated.

On July 13, 1981, Thompson was rehired.

3. Reinstatement allegations

The strike against Respondents continued from September 1980 through April 1981 with a significant number of employees of each Respondent having apparently continuously withheld their services in support of the strike. On May 1, the Union sent telegrams to each Respondent which stated:

> [The Union] unconditionally offers that all the unfair labor practice strikers return to work on Monday, May 4, 1981 at 8:00 a.m. The striking employees will report to work at that time.

On May 4, 1981, various striking employees of each Respondent met with management representatives at their respective facilities to discuss employee desires to return to work. None returned to work at that time. During May and June 1981, Respondents sent letters to certain strikers which stated in part:

> In response to your May 4, 1981 offer to return to work, you are requested to report to work at 8:00 a.m. on [various dates from a day to a week or more after the date of the particular letter].
>
> You will be employed in your former classification without loss of seniority, and will receive the improved wages and the same fringe benefits that have been offered to the Union, and which uniformly apply to all employees in the Service Department.
>
> In the event you cannot report for work as scheduled, please let me know immediately. The telephone number for you to call is [each Respondent's telephone number given].
>
> Additional time for you to report to work may be approved upon request, if necessary.
>
> If you fail to respond to this offer to return to work within 48 hours of receipt, you will be deemed to have quit your employment.

On June 23, 1981, Porsche Audi sent striking employee Rudy Acia a letter reciting that Acia had come to the facility on May 4, 1981, but had reported he would be unable to return to work for 2 months due to an injury. The letter told Acia he could return to work whenever he was physically able and asked that he keep Porsche Audi current on the state of his health.

None of the alleged discriminatees either accepted the jobs offered by the letters or requested additional time within which to report to work.

E. *Post-Settlement Allegations: Analysis and Conclusions*

The issue of the propriety of the Regional Director's withdrawing approval of and setting aside the January 12, 1981, settlement agreements requires an examination of Respondents' post-settlement conduct using the evidence of Respondents' presettlement conduct "only as background evidence in appraising Respondent's motives and objectives." *Jake Schlagel, Jr., d/b/a Aurora and East Denver Trash Disposal*, 218 NLRB 1, 9 (1975), and cases cited therein. Only if independent evidence of subsequent or continuing unfair labor practices reveal a breach of a settlement agreement may it be set aside. *Tompkins Motor Lines, Inc.*, 142 NLRB 1, 3 (1963), enforcement denied on other grounds 337 F.2d 325 (6th Cir. 1964); *United Dairy Co.*, 146 NLRB 187, 189 (1964). Accordingly, this analysis will consider first the complaint allegations dealing with post-settlement agreement conduct limiting consideration of presettlement evidence as noted. For purposes of this threshold analysis, the disputed versions of presettlement events, not otherwise specifically resolved elsewhere in this Decision, will be considered in the light most favorable to the General Counsel.

1. The discharge of Thompson

The General Counsel alleges that Thompson was terminated not because of misconduct but rather because of his activities as a striker. Respondent argues that Thompson was terminated solely because of his actions in harassing employee Madrano on February 20, 1981. It is clear that the dispute is largely one of fact rather than law for the alleged misconduct, if it occurred, is clearly

sufficient to justify termination under the circumstances. The General Counsel does not contend otherwise. Further, the dispute turns largely on the credibility resolutions necessary to resolve the conflicting testimony of Thompson and Madrano.

I have considered the essentially blanket denial of Thompson against the specific recollections of Madrano. Based on his superior demeanor I credit Madrano over Thompson. Madrano appeared to me to be an honest witness who testified to events which, although not recalled with chronological precision or with total recall as to detail, clearly identified Thompson as the driver of the car which without reason or justification endangered both Madrano and Volkswagen's customer's automobile. I found Thompson's denial of any role in the incident spiritless and unconvincing. Accordingly, I find that Thompson engaged in the misconduct attributed to him by Madrano. I also find that Madrano reported the events in question to his superiors and that this correct report of events was the sole basis for Thompson's termination. I specifically find Thompson was not terminated because of any activities protected under the Act. Accordingly, I shall dismiss this portion of the complaint.

2. Allegation of bad-faith bargaining[13]

The General Counsel's complaint alleges, at paragraphs 17 and 18, bad-faith bargaining by Respondents during the period July 1980 through March 1981. The allegations include but are not limited to: (a) dilatory scheduling of bargaining sessions and dilatory provision of requested information, (b) conditioning any agreement with the Union on union withdrawal of unfair labor practice charges and internal union charges against nonstriking union member employees of Respondent, (c) regressive bargaining proposals, and (d) maintaining a rigid and inflexible position regarding proposals. Resolution of good-faith bargaining issues requires consideration of all the circumstances surrounding bargaining and the relationship between the parties generally in order to determine the intentions of Respondents during the bargaining. Thus no isolated circumstance of event at a particular bargaining session necessarily resolved the question of Respondents' good faith. It appears useful initially however to look to the post-settlement bargaining within the framework of the above-listed allegations of the General Counsel.

(a) *Dilatory tactics*

The three post-settlement agreement bargaining sessions were held on January 28, February 25, and March 20, 1981. The January 28 meeting resulted from the Union's request to resume bargaining. The Union initially sent Comb a letter dated January 15 which proposed a meeting "as soon as possible" and which asked that Comb telephone the Union. Comb apparently did so and the January 28 date was ultimately agreed upon. No contention was made that the scheduling of this meeting was delayed improperly by Respondents. At the conclusion of the January 28 meeting, King proposed the next meeting be held on February 9. Comb demurred asserting that he did not know if he could obtain the pension information requested earlier that day by the Union by February 9. The date for the next session was therefore left open without expressions of disagreement by the Union. On or about February 11, the Union sent Comb a mailgram seeking a meeting on February 17. Although the record is not clear regarding the details, Comb replied by letter suggesting a meeting on February 25, which date was accepted by the Union. Comb testified without contradiction that he was unable to obtain the pension information sought by the Union until about that date. At the conclusion of the February 25 meeting no date was agreed upon for the next session. While neither Comb nor Stafford had a clear recollection, it appears the March 20 meeting was arranged by a later telephone call or letter. There is no evidence of disagreement regarding the selection of the date for the session.

The record reveals no disagreement between the parties regarding the scheduling of sessions save for the protest of the Union contained in the February 11 mailgram[14] that the session to follow the January 25 meeting was unreasonably delayed. Comb however established that the information sought by the Union was not on hand and there is no evidence the Union ever contested Comb's statement on January 25 that the next session should await his receipt of the information. There is therefore no significant evidence that Respondents engaged in improper delay or dilatory tactics in agreeing to dates for bargaining sessions after the settlement agreements were approved by the Regional Director. Nor do the timing of presettlement agreement bargaining sessions or the arrangements for scheduling the sessions, when considered as background evidence, provide any support for the General Counsel's contention that Respondents engaged in unreasonable delay. The only information requested by the Union during the post-settlement agreement bargaining was the pension information requested on January 25. This information was provided at the February 25 session. Thus, no delay in providing information after January 12 may be found.

(b) *Conditioning agreement on union withdrawal of charges*

The General Counsel's contention that Respondents conditioned reaching an agreement on the Union's withdrawal of unfair labor practice charges and internal union charges against union-member employees of Respondents goes to the substance of the March 20 bargaining session. This was the only session at which either

[13] The allegation of the December 1981 unilateral changes will be discussed separately, *infra*.

[14] The mailgram recited that the Union had "had no response to our inquiries as to the next date and time for negotiation." Stafford testified only to remarks made at the January 25 session. Comb testified that the first contact he had with the Union after that session was his receipt of the Union's mailgram. No witnesses testified to communication between January 25 and February 11, 1981. Counsel for the General Counsel asserts on brief that inquiries were made by the Union of Respondents between January 25 and February 11 and were not responded to by Respondents. Since the only evidence supporting this assertion is the hearsay statement in the wire and because this evidence, even if admissible for the truth thereof, is both inconsistent with the testimony of Comb on the question and not supported by Stafford or any other direct evidence, I find no such inquiries occurred.

matter was discussed. Withdrawal of related charges by the parties is a nonmandatory subject of bargaining. No party may withhold agreement otherwise at hand on the condition that the other take such action. It is not impermissible however to raise or discuss such matters if the suggested withdrawal is not held out as a condition upon which agreement depends.

Viewing the discussions of March 20 and Comb's remarks in either Comb's or Stafford's version of events,[15] I find there was no overt or even subtle suggestion by Comb that Respondents' conclusion of final agreements were in any way conditioned on the Union withdrawing charges. Rather, I find, in contemplation of agreement, Comb sought a broader agreement which would resolve all matters in dispute—a tack not unusual in concluding labor management disputes. Accordingly, I find there is no evidence to support a finding that Respondents at any time conditioned agreement on union efforts to withdraw or resolve either unfair labor practice charges or internal union charges against union-member employees of Respondents.

(c) *Regressive bargaining*

Respondents' initial bargaining proposal as compared to the previous contract—when viewed from the point of view of the Union—may be taken to be significantly less satisfactory and in this sense regressive. Indeed, this is true even when considering the later "improved" offers of Respondents. From the Union's perspective the "no cost" items of the Association contract were far more favorable and the Union sought throughout bargaining to preserve those earlier terms rather than accept the proposals of Respondents. Disregarding the expired contract, Respondents' proposals grew more favorable to the Union rather than less favorable as bargaining continued. In this sense they were not regressive. The differences between the parties diminished as bargaining progressed. Neither Respondent at any time changed its proposals in a manner making them less palatable to the Union or withdrew its later proposal and substituted an earlier, less favorable, proposal.[16]

(d) *Inflexible and rigid bargaining positions*

Respondents proposed a variety of new clauses in substitute for the various clauses in the expired Association contract. Several of these proposals were, from the Union's perspective, highly adverse and represented significantly a backward step from the expired contract. Indeed, little which could be regarded as a significant noneconomic benefit for the Union in the old contract was retained in Respondents' proposals. When these proposals were vigorously challenged by the Union at the earlier presettlement agreement bargaining sessions Comb offered little rationale in support of the proposals other than the bare assertions that Respondents desired them, that they would enhance management flexibility, or that the language in the expired contract had the potential of causing problems which, even if they had not occurred to date, would be avoided by management's new proposals. These presettlement positions were clearly rigid and inflexible.

The post-settlement agreement negotiations occurred after many issues had been resolved between the parties. There were ongoing concessions in these sessions. Ultimately the parties came close to agreement. At the initial post-settlement session on January 25, the Union proposed that its counsel draft new contract language which it hoped would resolved existing differences. This was acceptable to Comb and several differences were ultimately resolved. The February 25 sessions produced essential agreement on grievance and arbitration and management-rights language. At the March 20, 1981, meeting the Union offered to adopt Respondents' proposals on all unresolved questions if Respondents accepted the Union's proposal for a union-security clause. Respondents countered with a modification in their open shop clause coupled with the offer to accept the Union's proposal on pension[17] if the Union would accept its other proposals. The Union expressed opposition but asked for and received a week to reply to the offer. Thus by March 1981 each party had proposed a package of concessions which would, if accepted by the other, result in complete agreement. Thus to this point Respondents' post-settlement agreement bargaining was not obviously rigid or inflexible.

The rock on which final agreement apparently foundered was the difference between the final proposals regarding union security. The Union held out for a general union-security clause and Respondents stood firm, at least in March, for a union-security clause which provided current, i.e., strikebreaking, employees a period of time in which they could elect not to join the Union. The Union felt it could not accept the Comb clause because it would allow union members to work alongside nonmembers. It is not unusual for a Union to seek to avoid such a situation. By March, Respondents employed a number of employees who were crossing the picket line each day, some of whom were facing internal union discipline.[18] They felt it desirable to avoid obligating

[15] Were it necessary to do so, I could credit Comb over Stafford regarding this conversation to the extent the two differed. Comb seemed to me to have the better memory and a superior demeanor regarding those events.

[16] Respondents' offers to exchange one concession for another by the Union, when the offer was not accepted by the Union, are not regarded as withdrawn concessions.

[17] I credit Comb over Stafford and find that Porsche Audi made this explicit offer in the morning session. There is no doubt that Comb told the Union in the afternoon session that the morning proposals applied to Volkswagen. Although Comb could not recall if he explicitly mentioned the pension matter in the afternoon session, neither did the Union inquire as to the specific meaning of Comb's general statement.

[18] The General Counsel argues that Comb's assertions of Respondents' motivation for retention of an open shop clause or at least for provision of a current employee escape clause in any union-security clause are inadequate and are therefore evidence of bad faith and show that Respondents did not intend to reach agreement. Irrespective of the merits of Respondents' views of union security, a question not within my province, I find there is a nexus between (1) an employer's belief that strikebreaking employees, who have been the subject of various forms of hostility by the Union or striking employees, might not later wish to join that Union and (2) a desire to avoid obligating those employees to join the Union. While Comb admitted that, before the strike, his open shop proposal was "bargaining fodder," I credit the assertion that for Respondents in March 1981 the existence of a group of employees, who they believed would not wish to be forced to join the Union, was a significant motivating factor in opposing any union-security clause without the escape language noted.

those employees to join or remain members of the Union by accepting a general union-security clause. Thus each party had a not facially implausible reason for being inflexible and rigid as to the March 20 union-security proposals.

(e) *Post-settlement bargaining as a whole—the surface bargaining allegations*

The General Counsel, correctly citing cases for the proposition that good faith is a state of mind which must be evaluated by an examination of all the evidence, has skillfully weaved an argument on brief that Respondents participated in the negotiations with a desire not to reach agreement but "rather with the intent to frustrate agreement, and with the further objectives of forcing a bargaining impasse, a strike, and the eventual decertification of the Union." It is true that, as 1980 ended, bargaining had broken down, a strike was ongoing, and elections had been directed, which carried with them the potential for complete decertification of the Union. Thus the General Counsel's argument has force to December. Yet in January, settlement agreements were signed by the parties and approved by the Regional Director. Respondents concomitantly withdrew their election petitions and agreed to bargain in good faith with the Union.

There is no dispute that Respondents complied with the notice posting requirements set forth in the settlement agreements or otherwise broached their terms save as alleged in the complaint. There is no contention that, after the settlement agreements were approved, Respondents engaged in away-from-the-table conduct of the type alleged in paragraphs 15 and 16 of the complaint. I have found the Thompson termination allegation without merit. All of the above indicates that, even if Respondents engaged in the misconduct alleged in the complaint which occurred before the settlement agreements were approved,[19] there is little direct post-settlement evidence that Respondents entered into bargaining after the approval of the settlement agreements in bad faith with no intention to reach agreement.

The General Counsel correctly argues however that the settlement agreements, even if not set aside,[20] do not prevent consideration of Respondents' presettlement conduct as background evidence in appraising Respondents' motive and objectives in post-settlement bargaining. The entrance into the settlement agreements in the instant case by Respondents however does not merely raise a legal fiction affecting how prior events are to be considered. It is also, on this record, significant evidence of an expression of a willingness by Respondents to abandon efforts to obtain elections and a concomitant willingness to recognize and bargain with the Union as the exclusive representative of unit employees for a significant period.[21] The settlements are also an expression of an intent to start anew, to set aside prior conduct. The absence of post-settlement evidence of or even allegations of independent 8(a)(1) violations of the Act gives weight to the argument that Respondents had abandoned any illegal course of conduct. Thus, in addition to the restricting of presettlement evidence to background consideration, the entry into the settlements in the instant case and the cessation of away-from-the-table violations is independent evidence that, irrespective of possible earlier intentions to avoid agreement with or to defeat and therefore remove the Union, Respondents as of January 14, 1982, could well have accepted the proposition that the Union would represent its employees in the foreseeable future and have entered into bargaining thereafter with a new and proper attitude. Thus, the post-settlement conduct of Respondents in the context of events takes on great weight, even without the legal effect of the settlement agreements on consideration of Respondents' presettlement conduct.

I have considered counsel for the General Counsel and union counsel's arguments concerning the pattern of conduct they believe Respondents engaged in both before and after the settlement agreements to avoid reaching agreement with the Union. I find the arguments and the evidence cited fatally flawed by the fact that they rely almost exclusively on presettlement conduct to sustain their argument, which conduct is insufficient in my view to taint Respondents' post-settlement conduct on this record. Whether Respondents bargained in good faith or not before the settlements, there is insufficent evidence that Respondents or either of them failed to bargain in good faith after the settlements were approved. I seek no pattern or mode of presettlement conduct by either or both Respondents which convinces me, in connection with the post-settlement negotiations, that Respondents did not: (1) meet and bargain regularly; (2) make concessions and reach tentative agreements on contract proposals; and (3) generally attempt in good faith to reach agreement with the Union. Rather, I find that Respondents, and each of them, bargained in good faith after the settlement agreements were approved. I specifically reject the argument of the General Counsel and the Union that Respondents' early post-settlement offer of an open shop and its refusal to accept the union-security proposal of the Union in settlement of all issues, as well as its March counterproposal of a modified union-security clause, is substantial evidence of an intention by Respondents to avoid reaching an agreement. I am not called on to judge the fairness of proposals or to express my opinion as to what concessions should have been made at given times by one party or the other. Rather, I am bound to look to the intentions of the parties. Whlle it is true that Respondents' modified union shop proposal of March 20 was regressive when compared to the ex-

[19] The settlement agreements are not in any way an admission of prior wrongdoing by Respondents. Indeed, they contained explicit nonadmission language.

[20] In considering whether or not Respondents committed unfair labor practices after the approval of the settlement agreements, which justify their being set aside, it must be assumed that the settlement agreements are valid and effective. Thus, in evaluating the post-settlement allegations the presettlement evidence is utilized in the limited manner described, *infra*.

[21] Entry into the settlement agreements committed Respondents to recognition of the Union as representative of its employees for a reasonable period irrespective of subsequent events—including employee decertification petitions or other evidence of the Union's loss of employee support. See, e.g., *Poole Foundry and Machine Company*, 95 NLRB 34 (1951), and its progeny.

pired contract, it was a positive change from Respondents' previous proposals on the issue. I believe that Respondents' final union-security proposal made on March 20 was intended by Comb to consummate an agreement and not to frustrate it. Respondents' March proffer failed, as did all their later attempts to reach agreement; however, the test of good-faith bargaining is not in the ultimate resolution of particular differences. Accordingly, I find on this record that there is insufficient evidence to meet the General Counsel's burden of showing that Respondents were not seeking to reach agreement in good faith in the post-settlement agreement negotiations. There is also insufficient evidence to prove that Respondents were engaging in surface bargaining as alleged by the General Counsel. Accordingly, I shall dismiss this allegation of the complaint.

3. The reinstatement allegations

Paragraphs 23 through 26 of the complaint allege that Respondents improperly refused to reinstate certain striking employees. While the contentions litigated involve a variety of issues regarding the effect of certain employee offers to return to work and the validity of Respondents' offers of reinstatement, the necessary predicate to reaching these issues is a finding that the employees were at relevant times unfair labor practice strikers.[22]

The General Counsel argues that the strike was an unfair labor practice strike from its inception in September 1980. Respondent seems to argue on brief that no evidence of an unfair labor practice strike may be considered if it predates the settlement agreements, unless and until the settlement agreements are set aside.[23]

I find it unnecessary to decide if the strike was an unfair labor practice strike during the period preceding approval of the settlement agreements. Therefore I do not need to resolve the significant question of whether the settlement agreements bar any finding of a presettlement unfair labor strike. This is so because the reinstatement events occurred in and after May 1981, a period significantly after the settlement agreements were approved In January 1981. As described in more detail below, this intervening period is sufficiently long on the facts of this case to allow a determination of the issue of unfair labor practice striker status entirely on post-settlement events.

The settlement agreements were approved in January and their posting requirements were completed in due course.[24] I have found that no unfair labor practices occurred during the period after the approval of the settlement agreements but before the end of the period involving the reinstatement allegations. Thus, by May 1981, the presettlement agreement unfair labor practices, if any, would have been fully remedied. Even if the strike had been an unfair labor practice strike before the settlement agreements were approved, it would have become an economic strike by May and the strikers could have reverted to the status of economic strikers. See for example the conversion to economic striker in *Genova Express Lines, Inc. and Genova Transport, Inc.*, 245 NLRB 229 (1979).

Accordingly, I find that during May, June, July, and August 1981 the strike against Respondents was economic and that the strikers during that period were economic strikers and not unfair labor practice strikers. Because the General Counsel specifically disclaimed any assertion of a violation based on reinstatement rights of economic strikers, I find that the General Counsel's reinstatement allegations are without merit and shall be dismissed.

4. December 1981 changes in benefits—paragraphs 17(c)(3) and 18(c)(3) of the complaint

In September 1980 after the strike started, Respondents put into effect their last offers with certain exceptions. Employees were placed under the health and welfare plans previously applicable only to Respondents' nonrepresented employees rather than the Association's health and welfare plan. Unit employees were not covered by a pension plan at all until December 1981, when a plan generally similar to but not identical to the plan proposed to the Union in post-settlement negotiations was put into effect. This pension plan was apparently retroactive in its application to January 1981. The September 1980 implementation of the health and welfare plan and the simultaneous nonimplementation of a pension plan and all other presettlement agreement conduct must be regarded as subsumed in the settlement agreements until and unless they are set aside. There remains for consideration the admittedly unilateral institution of the pension plans by each Respondent in December 1981.

There is no doubt that by December 1981 the Union and Respondents were at impasse. A post-impasse unilateral change in working conditions is proper however only if the change implemented is consistent with the last offer made to the Union. The pension plan proposal put

[22] During argument at the conclusion of the General Counsel's case, counsel for the General Counsel made it clear that the General Counsel's theory of violation regarding the reinstatement allegations turned on a finding of unfair labor practice striker status. Counsel expressedly disavowed any claim of a violation if the employees were economic strikers. Thus, there was no litigation of the number of replacements or work vacancies at any given time. The General Counsel's clear statement on the issue was necessary to define the issues to be litigated in the case. See the difficulties engendered by a failure to clearly differentiate between economic and unfair labor practice strike theories in a striker reinstatement case in *IPCO Hospital Supply Corporation, Cheshire Labs Division*, 255 NLRB 819 (1981).

[23] Respondents cite *Jackson Manufacturing Company*, 129 NLRB 460 (1960). In that case the Board considered an allegation that unfair labor practice strikers who had been replaced were improperly denied reinstatement. The failure to reinstate the strikers was the only event which occurred after a settlement agreement had been approved. The settlement agreement addressed earlier conduct found in violation of Sec. 8(a)(1) of the Act but did not address conduct alleged as violative of Sec. 8(a)(5) of the Act even though that conduct was contained in the underlying charge. The Board panel majority held, Member Jenkins dissenting, that the settlement agreement must be honored and that, as a consequence, the Board was prohibited from looking behind the settlement agreement to the earlier conduct. Thus there was no usable evidence to show that the strike was an unfair labor practice strike. The Board therefore dismissed the complaint. In the instant case, unlike *Jackson*, the settlement agreements addressed 8(a)(5) conduct. They did not specifically address the economic or unfair labor practice status of the strikers however. Compare, for example, the language of the settlement agreement described in *Transport Inc. of South Dakota*, 225 NLRB 854 (1976), which explicitly recited that the strikers were unfair labor practice strikers.

[24] The parties stipulated that there were no irregularities in Respondents' compliance with the posting terms of the settlement agreements.

forward by Respondents during negotiations was specific in the dollar amount of Respondents' monthly contribution per employee and in the generic type of pension plan intended. The proposal was never described as fixed or firm in such details as vesting requirements, qualifying ages of employees, etc. Comb, even as late as February 25, told union negotiators Respondents' proposal was flexible depending on the Union's position. No negotiations were held after March 1981. Respondents never notified the Union that it was going to implement their pension plan and never modified or made more certain the pension proposals after March 1981. While the same in general terms and in cost, the plan implemented in December was not the same in its age requirements and vesting provisions as the plan described to the Union.

Under the circumstances of this case, I am unable to find that Respondents' implementation of the plan in December 1981 violated the Act. I reach this conclusion primarily because the plan implemented was well within the "flexible" parameters earlier discussed with the Union and, in that context, cannot be seen as at fatal variance with Respondents' last offer. I shall, therefore, dismiss this portion of the complaint.

F. *Presettlement Agreement Allegations; the Settlement Agreements: Analysis and Conclusion*

I have found that Respondents committed no unfair labor practices after the settlement agreements were approved. The settlement agreements were therefore improperly set aside and will be reinstated. *Stevens Sash & Door Company*, 164 NLRB 468 (1967), enfd. as modified in other respects 401 F.2d 676 (5th Cir. 1968). A valid settlement agreement bars the finding of a violation of the Act based on conduct which occurred before the settlement agreements were entered into, unless that conduct could not have been readily discovered by investigation. *Hollywood Roosevelt Hotel Co.*, 235 NLRB 1397 (1978). There was no claim made or evidence offered that Respondents' presettlement conduct at issue herein was not known to the General Counsel, reasonably discoverable by investigation or otherwise reserved by the settlement agreement.[25] Accordingly, I shall not further address the presettlement agreement allegations of the complaint nor resolve credibility conflicts which are relevant only to such determinations. All presettlement agreement allegations of the complaint will be dismissed.

Based on the above findings of fact and the record as a whole, I make the following:

CONCLUSIONS OF LAW

1. Respondents, and each of them, are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondents, and each of them, have not breached the settlement agreements in Cases 32-CA-3229 and 32-CA-3241 and it will effectuate the policies of the Act to reinstate each settlement agreement.

4. Respondents, and each of them, have not engaged in any unfair labor practices as alleged in the amended consolidated complaint.

Upon the above findings of fact, conclusions of law, and upon the entire record herein, and pursuant to Section 10(c) of the Act, I hereby issue the following:

ORDER[26]

1. The settlement agreements in Cases 32-CA-3229 and 32-CA-3241 shall be, and they hereby are, and each of them is, reinstated.

2. The consolidated complaint shall be, and it hereby is, dismissed in its entirety.

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[25] Counsel for the General Counsel in her opening remarks conceded that, if the post-settlement conduct of Respondent did not violate the Act, the General Counsel's entire case must fail.

[26] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.